United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1607

United States Court of Appeals

For the Second Circuit.

MIKE O'HARA,

Plaintiff-Appellant,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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INDEX

	PAGE
Statement.....	1
Issues Presented for Review.....	1
Statement of the Case.....	2
Facts.....	2
Argument.....	5
POINT I - The Court was in error in charging contributory negligence based on the evidence presented.....	6
POINT II - The entire record, including the jury's finding on the special verdict, indicates confusion and compromise and a new trial should be ordered.....	7
Conclusion.....	10

TABLE OF CASES CITED

	PAGE
Caskey v. Village of Wayland, 375 F. 2d 1004 (1967).....	7, 10
Hawn v. Pope & Talbot, 346 U.S. 406, 74 S. Ct. 202.....	6
Lopez v. Southern Pacific Company, 499 F. 2d 767 (1974).....	6
Rivera v. Farrell Lines, Inc. 474 F. 2d 255 (CCA 2, 1973).....	6, 7

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MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

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PLAINTIFF-APPELLANT'S BRIEF

STATEMENT

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York on the 11th day of January, 1974 following a trial before the Hon. ROBERT J. WARD, U.S.D.J. and a jury.

There was no decision or opinion rendered by the Court below which has been reported.

ISSUES PRESENTED FOR REVIEW

1. Was the Court below in error in charging contributory negligence of the plaintiff in the absence of any proof to support such charge?

2. Does consideration of the entire record, including the jury's answers to special interrogatories in which it found the defendant guilty of negligence in the action wherein fault

was predicated exclusively on a defective escalator, and in conflict with such finding did not find that the vessel was unseaworthy, warrant a remand of the entire case for retrial?

STATEMENT OF THE CASE

This is a seaman's action brought to recover damages for personal injuries sustained on board the S.S. BRASIL on the 19th day of May, 1969.

The case was tried before the Hon. ROBERT J. WARD and a jury in the Court below on January 2nd, 3rd, 4th, 7th, 8th and 9th, 1974.

The Court submitted interrogatories to the jury. In answer to these interrogatories, the jury found that the defendant was negligent, but did not find that the vessel was unseaworthy.

It found that plaintiff's damages amounted to $8,140.00 and found that plaintiff's own fault contributed to the accident to the extent of 75%. Plaintiff's net recovery amounted to $2,035.00. *(A 4, 5)

FACTS

Plaintiff was employed on board the defendant's

*(Pages in parenthesis refer to pages of appellant's appendix)

vessel, the S.S. BRASIL, as a wine steward. At the time of the accident, he was carrying a tray of glasses up an escalator when the escalator jerked causing him to lose his balance and fall backwards. (A 14)

He was rendered unconscious after falling to the foot of the escalator and was thereafter removed to the ship's hospital in a wheel chair attended by a nurse and doctor and others. (A 14, 26)

A disinterested witness, Gaston Firmin-Guyon, fireman, testified that he was on the dining room deck about to descend down the escalator when he saw O'Hara on the other escalator going up. He saw the escalator jerk and O'Hara fall down backwards to the deck below. He summoned help from the hospital. Another crew member, Randolph Scott, arrived. (A 12, 15)

He testified that he had observed the escalator jerk prior to the accident and had reported it several times, made repair slips out and placed them in a box. (A 15, 16, 18)

Mr. Guyon further testified that O'Hara was a good efficient worker and had never complained of his head and back. After the accident he observed O'Hara had changed considerably; he was not the same man and Mr. Guyon saw him walk with slow gait using a cane. (A 18, 19)

Plaintiff called Randolph Scott, chief utility man.

Mr. Scott testified that he heard noise, looked back and saw O'Hara and crumbled glasses (A 22). He turned off the escalator with a key so it stopped instantly. He saw O'Hara lying on his back at the foot of the escalator (A 23). He pulled O'Hara away from the escalator and placed him on a table. A doctor was called who came with a wheel chair and took O'Hara to the hospital (A 23, 24)

Mr. Scott testified that he had seen the escalator jerk and shake a number of times prior to the accident to O'Hara, the first time being a few months before the accident and the last time a couple of weeks before the accident. He stated that people in his department had complained to him and he in turn made complaints to the electrician. He testified that the escalator was always out of order and that waitresses had tumbled on the escalator. (A 24, 25, 27)

No eye witnesses to the accident were called by defendant.

Defendant called Donovan Miller, the electrical engineer aboard ship who denied any knowledge of any complaints as to the escalator or any knowledge of O'Hara or anyone else ever getting hurt on the escalator. (A 30)

David Steel, a designer engineer for Otis did not testify about the accident. His testimony was limited to his statement that once the escalator was stopped it could not be restarted without a key switch. (A 36)

Robert Esposito, claims investigator, testified that his investigation was limited to observing O'Hara walk normally from his hone to the Union Hall. He also admitted that he saw O'Hara walk with a limp. (A 37, 39)

Plaintiff was 45 years of age when the accident in question occurred (p. 97, trial transcript). He was marked permanently unfit for sea duty on August 24, 1970 (p. 115, trial transcript). He had earned close to $4,000.00 from the beginning of 1969 to the date of the accident, a period of approximately five months (p. 136, trial transcript).

ARGUMENT

There is no testimony by any witness that the plaintiff committed any act which was contrary to good practice and reasonable conduct by a seaman under the prevailing circumstances.

As wine steward, he obviously had nothing whatever to do with the maintenance of the escalator.

The Court instructed the jury that it could find

plaintiff guilty of contributory negligence and could reduce any award made to plaintiff accordingly.

POINT I

THE COURT WAS IN ERROR IN CHARGING CONTRIBUTORY NEGLIGENCE BASED ON THE EVIDENCE PRESENTED.

The charge of contributory negligence in the absence of any proof thereof constitutes error and is in conflict with the holding in the case of Rivera v. Farrell Lines, Inc., 474 F. 2d 255 (CCA 2, 1973), wherein the Court stated at page 259:

> "To allow a finding of contributory negligence on the basis of evidence which was at best incomplete and on a theory of which there was no real notice to the appellant could substantially prejudice him."

In the case of Lopez v. Southern Pacific Company, 499 F. 2d 767 (decided July 1, 1974, rehearing denied July 25, 1974), the United States Court of Appeals for the Tenth Circuit stated in its opinion at page 772:

> "Contributory negligence is an affirmative defense which must be proved by the appellant."

See also: Hawn v. Pope & Talbot, 346 U.S. 406, 74 S. Ct. 202

The Court in Lopez, supra, went on further to state, in substance, that a party is entitled to an instruction

based on the theory of the case if there is evidence in the record to support it.

The reverse is obviously also true. For the Court to give an instruction in the absence of any evidence to support such an instruction constitutes error.

P O I N T II

THE ENTIRE RECORD, INCLUDING THE JURY'S FINDING ON THE SPECIAL VERDICT, INDICATES CONFUSION AND COMPROMISE AND A NEW TRIAL SHOULD BE ORDERED.

The inconsistent and diametrically contradictory findings by the jury that the physical condition of the escalator constituted a basis for a finding of negligence, but did not constitute a basis for a finding of unseaworthiness, was clearly erroneous and it was error for the Court to refuse to set aside the verdict.

The inconsistent findings by the jury clearly demonstrate the same facts as was held as the basis for reversal and remand of the entire case for retrial by the United States Court of Appeals for the Second Circuit in the case of Caskey v. Village of Wayland, 375 F. 2d 1004 (1967) cited with approval in Rivera, supra.

In Caskey, supra, the Court stated at page 1009:

"There remains but one final issue for our consideration. Appellant has urged us to order a new trial limited to the issue of damages. We do not believe, however, that such a course should be followed in this case. Partial new trials should not be resorted to "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Gasoline Products Co. v. Champlin Refining Co., 282 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931). In the present case, the trial was not divided into separate stages; the issues of liability and damages were tried together. Moreover, the small judgment returned by the jury may well indicate that the jurors were not unanimous in their finding of negligence, and that the verdict represented a compromise on that issue.[7] In these circumstances, we believe that it would be unjust to the defendants to restrict the new trial to the issue of damages. Bass v. Dehner, supra; Moore's Federal Practice § 59.06 at p. 3762; cf. Dimick v. Schiedt, supra, 293 U.S. at 486, 55 S. Ct. 296, 79 L. Ed. 603.

Reversed and remanded."

The jury did not understand the charge, as evidence by the following:

The jury retired at 2:40 p.m. on January 8, 1974. (A 65)

At 3:00 p.m. the jury requested to hear the testimony of Mr. Scott and Mr. Guyon as to the accident (Court's Exhibit 1). The testimony was read. (A 66)

At 3:30 p.m. the jury retired again. (A 68)

At 4:15 p.m. the jury requested to see the medical

records of the United States Public Health Service Hospital, Staten Island, New York (Court's Exhibit 2). The medical records were sent to the jury. (A 68)

The Court below was in error in failing to charge the jury as to what weight or consideration, if any, to give to documentary evidence, including the United States Public Health Service Hospital records, as to plaintiff's injuries and permanent sequelae therefrom, but limited his instructions to the fact that the jury was at liberty to give such weight, if any, as they chose as to the expert opinions offered in the case.

The documentary evidence, including the United States Public Health Service Hospital records show a finding by the jury which was, at best, a compromise verdict and, at worst, indicated complete confusion.

At 5:00 p.m. the jury requested the records of the New Orleans and Miami Public Health Service (Court's Exhibit 3), which were sent to the jury. (A 68)

At 5:55 p.m. the jury returned to the box and deliberation was adjourned to January 9th at 9:30 a.m. (A 69)

On January 9th, the trial continued at 9:45 a.m. (A 72)

A note was received from the jury - it wished to hear the charge on definition and proof of negligence (Court's Exhibit 4). (A 73)

At 10:00 a.m. the jury requested plaintiff's

Exhibit 9 and defendant's Exhibits F. G. & H. (Court's Exhibit 5). (A 73)

The Court read a brief definition of negligence from the charge.

Juror #6 requested to hear it all and the Court read further from the charge, including a repetition of the charge on comparative negligence. (A 75)

It is interesting to consider footnote 7 on page 1010 in the case of Caskey, supra, which states as follows:

> "7. We note that it took the jury 4 hours and 5 minutes to reach its initial verdict, but only 20 minutes upon reconsideration to award $1,100 for pain and suffering."

The jury returned with its verdict, finding the defendant negligence and the vessel not unseaworthy at at 2:00 p.m. (A 81).

It would seem that the jury did find that the escalator did not work properly to the knowledge of the defendant, but as it was not shown any physical mechanical defect in the escalator, felt that unseaworthiness was not proven.

CONCLUSION

The Court below was in error in charging contributory negligence. The findings by the jury were

contradictory and as such demonstrated mental confusion, compromise or misunderstanding of both the law and the facts.

The Court below was in error in failing to set aside the jury's verdict as against the weight of the evidence.

A new trial should be ordered.

Respectfully submitted,

RASSNER & RASSNER
Attorneys for Plaintiff-Appellant

JACOB RASSNER,
On the Brief.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Harry Malinowitz being duly sworn, deposes and says that he is employed by JACOB RASSNER, attorney for the above named Plaintiff-Appellant herein.

That on the 25th day of October, 1974, ~~196~~, he served the within Brief upon Heidi, Nickerson, & Reilly the attorney for the above named Defendant Appellees; by depositing Two copies a true copy of the same securely enclosed in a post-paid wrapper at an Official Depository maintained and exclusively controlled by the United States at 15 Park Row, New York City, N. Y., directed to said attorneys for the Defendant-Appellees, at No. 61 Broadway, New York, N. Y., that being the address within the state designated by them for that purpose upon the proceeding papers in this action, or the place where they then kept an office between which places there was then and now is a regular communication by mail.

Deponent is over the age of 18 years.

Harry Malinowitz

Sworn to before me this
25th day of October 1974 ~~196~~.

Ann Bernard

ANN BERNARD
NOTARY PUBLIC, State of New York
No. 24-6257220
Qualified in Kings County
Commission Expires March 30, 19